

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service
Commission held in the City of
Albany on October 13, 2016

COMMISSIONERS PRESENT:

Audrey Zibelman, Chair
Patricia L. Acampora
Gregg C. Sayre
Diane X. Burman

CASE 15-E-0560 - Complaint of Glenwyck Development, LLC Against
Niagara Mohawk Power Corporation d/b/a National
Grid Concerning Underground Residential
Distribution Provisions Contained in Rule 16 of
PSC Tariff No. 220.

ORDER GRANTING RELIEF AND ORDERING TARIFF CHANGES

(Issued and Effective October 17, 2016)

BY THE COMMISSION:

INTRODUCTION

On August 3, 2015, Glenwyck Development, LLC (Glenwyck) filed a complaint¹ against Niagara Mohawk Power Corporation d/b/a National Grid (Niagara Mohawk), alleging that Niagara Mohawk's tariff provisions regarding the payment for costs associated with the extensions of service violate the Commission's regulations. Glenwyck argues that Niagara Mohawk's tariff improperly reduces the utility's obligation to pay for service extensions by allocating the costs across all utilities that use the trench and requiring Glenwyck to pursue recovery from the other utilities.

¹ Glenwyck characterizes its filing as a complaint, however, given the relief requested and our determination of this matter, it is more accurate to consider the filing a petition, and the filing shall be referred to as the Petition.

Under Public Service Law (PSL) §31(4), electric utilities are obligated to provide service to buildings currently without service. The section also authorizes the Commission to "require applicants for service to buildings located in excess of one hundred feet from gas or electric transmission lines to pay or agree in writing to pay material and installation costs relating to the applicant's proportion of the pipe, trench, duct or wire, or other facilities to be installed," which the Commission has done.²

In this Order, the Commission finds that Niagara Mohawk's pro rating of trenching costs violates the requirements of PSL §31(4) and 16 NYCRR §98.2(e), by not compensating developers for the full cost of providing electric service up to the 100 feet the utility is obligated to provide free of charge. Niagara Mohawk is ordered to make full payment to Glenwyck, and revise its tariff to comply with the requirements of PSL §31(4) and Part 98 of the Commission's regulations.

PETITION

Glenwyck is the owner and developer of the Dutch Meadows Subdivision (Subdivision) in the Village of Scotia, Schenectady County. The Petition states that on October 1, 2014, Glenwyck's contractor received a proposal from Niagara Mohawk to provide electric service to the Subdivision. The proposal acknowledged the utility's obligation to provide 100 trench feet of single-phase underground distribution per residential unit to be served without contribution; and that the subdivision was entitled to receive the required 3,660 trench feet on a refundable basis. These entitlements are in accordance with Niagara Mohawk's Schedule for Electric Service, PSC No. 220 Electricity, Tariff Rule 16 (Rule 16). On the same

² See 16 NYCRR §98.2(e).

day, Niagara Mohawk emailed an "explanation and breakdown" of the charges for the work on the Subdivision. Regarding the refund of trenching costs, Niagara Mohawk stated that it was only responsible for the cost of the part of the trench used for electric service and would reimburse Glenwyck's contractor a fraction of the costs, based on the number of utilities occupying the trench. The unallocated reimbursement rate would be \$16.39 per foot; however Niagara Mohawk provided a figure of \$4.10 per foot, because of the presence of gas, cable and telecom services in the trench. Niagara Mohawk based its position, according to the Petition, on its Tariff Rule 16.4.4.1³ and Statement of Underground Residential Distribution Contribution Statement No. 3 (URD Statement). The URD Statement provides a chart listing Niagara Mohawk's reimbursement rates for trenching options⁴ based on the number of occupants.

Glenwyck argues that Niagara Mohawk's URD Statement, which reduces the utility's reimbursement based on the number of utilities occupying its trench, is contrary to its obligations under Parts 98 and 100 of the Commission's regulations. Glenwyck argues that §100.1(d) requires the utility to allow an applicant to perform necessary work, and be reimbursed for same

³ Stating in part, "If the non-residing applicant/developer elects to excavate and backfill the trench, the Company will reimburse the non-residing applicant/developer the per foot trench cost for developers as set forth in the Company's URD Statement. Reimbursement will be provided after completion of the trench work and the Company's verification that the trenching performed by the nonresiding applicant/developer is in conformance with Company specifications."

⁴ Under URD Statement No. 3, which was effective when Glenwyck was under development, applicants would be compensated as follows: \$16.39/foot for one occupant in the trench, \$8.20/foot for two occupants in the trench, \$5.46/foot for three occupants in the trench, and \$4.10/foot for four occupants in the trench.

(up to the authorized 100 feet); while §98.2(e) determines the amount to be reimbursed. Glenwyck further argues that §100.2 imposes a separate obligation on the utility to contact other potential occupants of underground facilities to coordinate delivery of services, which in no way affects the utility's obligations to the applicant.

Glenwyck also argues that Niagara Mohawk cannot avoid its obligations by amending its URD Statement to reduce the level of reimbursement to applicants. Glenwyck states that the effects of the changes to the URD Statement are not the "minor housekeeping revisions" characterized in Niagara Mohawk's filing letter. Glenwyck argues that the costs incurred by an applicant to install underground facilities, and the utility's statutory obligations, do not vary based on the number of utilities that occupy the facilities. Finally, Glenwyck argues that Niagara Mohawk's attempt to shift installation costs to applicants doubly enriches the utility by avoiding its obligations as a gas utility, in addition to its obligations as an electric utility, to provide service to new customers.

Glenwyck requests that the Commission order Niagara Mohawk to fully reimburse it for the cost of installing underground facilities in the Subdivision and to amend its Statement to remove the alleged conflict with the Commission's regulations. Glenwyck also requests that the Commission clarify the utility's obligations, for both electric and gas services, to new applicants such as Glenwyck.

Niagara Mohawk's Response

On November 30, 2015, Niagara Mohawk filed a response⁵ to the Petition that raised three arguments in the utility's

⁵ Case 15-E-0560, supra, Response of Niagara Mohawk Power Corporation d/b/a National Grid (filed November 30, 2015 (NM Response)).

defense. First, Niagara Mohawk argues that Glenwyck improperly expects it to pay for costs related to other utilities' trenching needs. Niagara Mohawk bases this argument on the fact that the Commission's regulations only require electric utilities to pay for a developer's trenching costs related to providing electric service.

Essentially, Niagara Mohawk argues that since it is one of four utilities occupying the Glenwyck trench, the costs related to providing electric service are one quarter of the total costs of installing the trench. Payment beyond this amount, the utility argues, would be a subsidy for the other utilities, which should be contributing to the trench costs to the extent they benefit. Niagara Mohawk also argues that its practice is not affected by the Commission's previous Orders regarding Niagara Mohawk's trenching compensation practices.⁶

Niagara Mohawk's second argument is that its URD Statement, which details its prorating practices, does not diminish its statutory or regulatory obligations. Niagara Mohawk argues the URD Statement simply ensures that its ratepayers are not paying for trenching costs related to other utilities.

Finally, Niagara Mohawk argues that its gas practices are consistent with its regulatory obligations because gas utilities are not required to reimburse developers for trenching costs.

⁶ See Case 13-E-0100, Niagara Mohawk Power Corporation d/b/a National Grid - Clarifying Tariff, Untitled Order (issued October 18, 2013); and Case 13-E-0516, Niagara Mohawk Power Corporation d/b/a National Grid - Clarifying Tariff, Order Approving Tariff Revisions (issued February 24, 2014) (Tariff Orders).

Subsequent Filings

On December 2, 2015, Glenwyck filed a letter in response to the Niagara Mohawk response. Glenwyck argues that Niagara Mohawk improperly focuses on other utilities' lack of requirements to reimburse developers on trenching costs, rather than its own obligations in this area. Glenwyck argues that Niagara Mohawk's reimbursement figures are based on its avoided trenching costs, which are unrelated to the presence of other utilities.

On December 4, 2015, Niagara Mohawk filed a letter in response to Glenwyck's December 2 filing. While reiterating its position, Niagara Mohawk argues that because Glenwyck's letter was filed after the 45 day State Administrative Procedure Act (SAPA) comment period, it was untimely and should not be considered in this proceeding. On December 7, 2015, Glenwyck filed a letter disputing Niagara Mohawk's argument that Glenwyck's prior letter was time barred.

PUBLIC NOTICE

In accordance with State Administrative Procedure Act (SAPA) §202(1), notice of Glenwyck's petition was published in the State Register on October 14, 2015 (SAPA Number 15-E-0560SP1).

Niagara Mohawk submitted a response on November 30, 2015, and a supplemental response on December 4, 2015. Glenwyck filed responses to National Grid's filings on December 2, 2015 and December 7, 2015.

STATUTORY AUTHORITY

Under PSL §31(4), when electric or gas service is requested for a building that does not currently have service,

a utility corporation or municipality shall be obligated to provide service to such a building, provided however, that the Commission may require applicants for service to buildings located in excess of one hundred feet from gas or electric lines to pay or agree in writing to pay material and installation costs relating to the applicant's proportion of the pipe, trenching, duct or wire, or other facilities to be installed.

Under 16 NYCRR §98.2(e), the Commission exercised its authority to require applicants to pay for the extension of service beyond 100 feet,

Where a utility is required... to provide residential underground service, the cost and expense which a utility must bear... shall include the material and installation costs for up to a total of 100 feet of underground distribution line ... and underground service line per dwelling unit served, measured from the utility's existing electric system.

Under 16 NYCRR §100.1(d), when new electric service lines are installed, the work may be done either by the utility or the applicant. In the latter case, the costs are to be allocated in accordance with 16 NYCRR §98.2. Finally, under 16 NYCRR §100.2(b), when new underground facilities are constructed, the utility is required to inform the telephone and cable companies serving the area to allow the two to use the utility's new facilities.

DISCUSSION

PSL §31(4) makes clear that when an electric or gas utility receives a request for utility service for a building which is not currently supplied with electricity or gas, the utility "shall be obligated to provide service..." While the section does not state that the utility shall pay such costs, the provision authorizing the Commission to "require applicants for service to buildings located in excess of one hundred feet

from gas or electric transmission lines to pay ... material and installation costs relating to the applicant's proportion ...," clearly indicates that the electric or gas utility is required, at least, to pay costs related to the first 100 feet of service lines.

Niagara Mohawk's attempt to shift these costs to Glenwyck, ostensibly because of the other utilities' use of the installed trench, is clearly contrary to the requirements of §31(4) and therefore invalid. When Niagara Mohawk performs the trenching and there are multiple utilities in the trench the reimbursement agreements Niagara Mohawk has with other utilities reduce the Company's trenching costs for electric facilities.

Niagara Mohawk explains,

The Company has in place agreements with telecom and cable utilities to provide for reimbursement to the utility that ultimately performs the trench work, which, in turn, reduces the cost to the Company's customers for the trench work. The Company does not, however, collect or receive reimbursement from cable and telecom companies if the Company does not perform the trench work.⁷

The question is the appropriate rate the Company should reimburse a developer when the developer performs the trenching. The cost to perform the trench work is Niagara Mohawk's gross cost. If Niagara Mohawk performs the work itself, or hires its own contractors, it would pay the gross cost of those first 100 feet, and seek reimbursements from the other utilities occupying the trench.

Niagara Mohawk argues that "[t]o the extent that other utilities are present in a common trench, it is the responsibility of those utilities, to contribute to the

⁷ NM Response, p. 4.

developer's trench costs - that responsibility should not solely be the burden of the electric utility;⁸ and that,

[i]t would be inequitable if the Company, and its customers, were required to bear *all* trench costs associated with the common trench when other utilities directly benefitted from use of that trench and, but for use of the common trench, would have to incur those trench costs on their own.⁹

However, there are no statutory requirements for other utilities to reimburse the developer that use the common trench. Niagara Mohawk states,

The provisions requiring developer trench reimbursement are contained in 16 NYCRR §§ 98.2(k) and 100.1(d). Both provisions are found in the electric only portion of 16 NYCRR and thus are expressly limited to electric service. There is no equivalent regulation in either the gas, telecom or cable regulations. With the exception of telecom, those regulations do not even provide a developer with the option to trench or be reimbursed for that work, and the telecom regulations explicitly provide that developers electing to perform the trench work necessary for the installation of facilities within a subdivision do so at their own expense.

By 16 NYCRR §§98.2 (e) it is the obligation of the electric utility to provide the material and installation costs of up to a total of 100 feet of underground distribution and supply line. Under §31(4) Niagara Mohawk is obligated to reimburse the developer the full cost associated with trenching. Rather than prorating its payments to developers, Niagara Mohawk is directed to change its existing practices regarding the recovery of trenching costs from other utilities whenever the developer performs the trenching. While the Commission finds

⁸ Id.

⁹ Ibid., p. 5.

that Niagara Mohawk's practice of prorating its payments to developers is inconsistent with the PSL and Commission Rules, it is important for electric utilities to seek reimbursement from other occupants of newly installed facilities. The distribution of costs associated with the installation should be the same whether the utility performs the trenching or if the work is completed by the developer. In this manner, the electric utility's ratepayers will not unfairly absorb costs that should be allocated to other beneficiaries of the work.

Having determined that the URD Statement's terms violate the PSL, the Commission must determine what steps beyond revision of the URD Statement can and should be taken. Ordinarily, a charge made in compliance with a utility's tariff is valid as a matter of law and immune to legal challenge under the filed rate doctrine. A customer who pays a filed rate cannot later seek a refund on the grounds that the rate is somehow improper. The reasoning behind the doctrine is that equal treatment by regulated companies is of paramount importance, and allowing customers to pursue refunds after receiving service would violate that principle.¹⁰

For two reasons, the Commission concludes that the filed rate doctrine does not apply to the current case. First, the rate is not at issue. The PSL requires Niagara Mohawk to provide the first 100 feet of service at no charge. There is no rate for this service for anyone to dispute. While it is true that the filed rate doctrine applies to more than just the rates

¹⁰ American Telephone and Telegraph Co. v. Central Telephone, Inc., 524 U.S. 214, 223 (1998) (stating, "the policy of nondiscriminatory rates is violated when similarly situated customers pay different rates for the same service").

listed in a tariff,¹¹ the service that is being provided, 100 feet of service line, and the charge to be paid by the applicant, nothing, are defined in statute and regulation. Therefore, there is no dispute regarding what is owed for what service. The only question is whether the URD Statement's terms of repayment meet the requirements of the law. The Commission has determined that they do not, and it is proper for Niagara Mohawk to compensate those applicants affected by the practice.

The Commission's second reason for not applying the filed rate doctrine involves the different treatment of similarly situated customers. As stated above, the charge to customers for the first 100 feet of service line under the PSL is zero. For instances where Niagara Mohawk, or its contractors, perform this work, that is the case. The utility performs the work and receives no compensation for the costs other than what is already provided for in rates, or through its compensation agreements with other utilities. Likewise, in instances where electrical service is the only occupant of the trench, regardless of who does the work, the utility receives no compensation.

However, when the work is done by the applicant and there are multiple utilities occupying the trench, Niagara Mohawk provides only partial compensation for the work performed. This is the equivalent of charging the applicant for the service and contrary to the law. A fundamental principle of utility regulation is that similarly situated customers are

¹¹ Ibid., at 223 (stating, "Rates, however, do not exist in isolation. They have meaning only when one knows the services to which they are attached. Any claim for excessive rates can be couched as a claim for inadequate services and vice versa. If 'discrimination in charges' does not include non-price features, then the carrier could defeat the broad purpose of the statute by the simple expedient of providing an additional benefit at no additional charge").

entitled to uniform treatment, and the URD Statement inevitably leads to disparate treatment of applicants for service. Since neither a tariff leaf, nor the Commission, can authorize Niagara Mohawk to violate the law, the Commission may require Niagara Mohawk to pay the full installation costs of providing service to the Subdivision.

CONCLUSION

Niagara Mohawk's Statement is contrary to the requirements of PSL §31(4) and therefore invalid. The Commission requires Niagara Mohawk to revise its Statement so that applicants are fully compensated for trenching costs, regardless of the number of utilities that might occupy the trench, and reimburse Glenwyck.

The Commission orders:

1. Niagara Mohawk Power Corporation d/b/a National Grid shall file no later than 30 days after the issuance of this order, revisions to its Residential Distribution Contribution Statement as described in the body of this order.

2. Niagara Mohawk Power Corporation d/b/a National Grid shall, within 30 days of the issuance of this order, pay Glenwyck Development, LLC the unreimbursed cost of providing trenching for the first 100 feet of service to Dutch Meadows Subdivision.

3. Niagara Mohawk Power Corporation d/b/a National Grid shall within 60 days of this Order submit a plan to reimburse all other applicants for service affected by the prorating of trenching reimbursement costs.

4. The Secretary in her sole discretion may extend the deadlines set forth in this order. Any request for an extension must be in writing, must include a justification for the extension, and must be filed at least one day prior to the affected deadline.

5. This proceeding is continued.

By the Commission,

(SIGNED)

KATHLEEN H. BURGESS
Secretary